DATE: APRIL 4, 1996

CASE NO: 94-INA-538

In the Matter of

ManAsia, INC.
Employer

on behalf of

ARNOLD BALIGOD FERRY
Alien

Before: Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

ORDER OF REMAND

This case arises from ManAsia, Inc.'s ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On September 30, 1991, the Employer filed a Form ETA 750, Application for Alien

Labor Certification, with the New York State Department of Labor ("NYDOL") on behalf of the Alien, Arnold Baligod Ferry. The job opportunity was listed as "In-house Counsel" for a Placement Agency. AF 22. The application set forth the minimum requirements of a J.D. or L.L.B., two years of experience and a license to practice law in the State of New York. AF 27. The job duties were listed as follows:

> Handle all immigration cases & other related problems of clients, such as H-1 petitions & extensions, Labor cert. applications, change & adjustment of immig. status, family-based & employment based petitions, & naturalizations. Represent clients at INS & consular interviews. Handle all divorce cases. Prepare wills & contracts. Supervise two assistants.

AF 16.

On September 14, 1992, the Employer informed the NYDOL that none of the thirty-seven applicants who had responded to its advertisement had been offered the job. AF 205-09. The application was thereafter sent to the CO on December 2, 1992. AF 227.

The CO, in a Notice of Findings ("NOF") dated December 3, 1993, proposed to deny the application because the Employer had unlawfully rejected U.S. workers and because it was not clear that the Employer had an actual "employment" opportunity as defined in 20 C.F.R. §656.50.[1] AF 244-46. The CO required the Employer to document that two of the applicants that it had rejected were not qualified, willing or available to work at the time of initial contact. AF 245. The CO also required the Employer to document the relationship between the Alien, Arnold B. Ferry, the Employer, ManAsia, Inc., and the president of ManAsia, Mr. Madlansacay. AF 244. The CO indicated that she had discovered documents showing that the Alien, Arnold B. Ferry, had previously represented ManAsia and other employers in alien labor certification proceedings. AF 228. The documentation shows that the Alien has had his own law practice, but that he has also been associated with two other attorneys: George W. Nash and Walfredo Castillo. Letters sent by the Alien on his own letterhead ("Arnold B. Ferry, Attorney at Law") indicate that the Alien has had two addresses: "Suite 3E, 114 Fulton Street, New York, NY 10038," and "Suite 4W, 114 Fulton Street, New York, NY 10038." AF 235-36. The CO noted that the Alien's "Suite 4W" address and corresponding telephone number were the same as ManAsia's. The CO also noted that the Alien, while at both of his addresses, had the same fax number as ManAsia. In addition, the CO noted that ManAsia's President, Len T. Madlansacay, was listed on the Alien's letterhead with the title "Immigration Research Specialist, Not a Member of the Bar." The CO stated that this documentation gave her the impression that the Alien has his own law practice and that Mr. Madlansacay works for the Alien. The CO, however, questioned this notion in light of the fact that the "application indicates, [that the Alien] does not have his own practice but is an employee of ManAsia." AF 245. Thus, the CO requested the following information to clarify that "employment" exists:

> . . . you must document what the relationship between ManAsia, Inc., Arnold

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[1] *Employment* means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

20 C.F.R. §656.3.

> Ferry, and yourself is, who employs whom, and that Arnold Ferry is an employee of ManAsia, Inc. on a full-time basis. Who is located in Suite 3E and in 4W?
>
> Item 15 of the ETA7-50B must also reflect alien's employment to date to show current employment and date he left Mr. Castillo's employ.

AF 244.

In rebuttal, the Employer sent a letter dated January 2, 1994. AF 259-61. In the letter, the Employer explained that it had unsuccessfully attempted to contact both U.S. applicants and that, in any event, they were unqualified for the position. AF 260-61. In regard to the issue of "employment," the Employer explained that it is located at Suite 4W, Fulton Street and that the Alien had occupied an office located at Suite 3E, Fulton Street after the attorney who leased that office, George W. Nash, had been suspended from practice. The Employer stated that, prior to his suspension, Mr. Nash had been the only attorney working for ManAsia, but that during his suspension, ManAsia utilized the legal services of the Alien and Walfredo Castillo. The Employer stated that when Mr. Nash returned to practice in August of 1992, ManAsia decided to continue using the Alien's services and that the Alien "collaborated with Mr. Nash as counsels for ManAsia, Inc." AF 259. According to the Employer, Mr. Nash and the Alien moved into ManAsia's office at Suite 4W, Fulton Street, in November of 1992. The Employer further explained that:

> ManAsia, Inc. and George W. Nash and Arnold B. Ferry are separate entities. Arnold B. Ferry is still associated with Walfredo Castillo in the practice of law, and collaborating with George W. Nash in rendering legal services to ManAsia, Inc.
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> Len T. Madlansacay who is the President of ManAsia, Inc. is not an employee of either Arnold B. Ferry and George W. Nash. The only reason why his name appears on the letterheads of Arnold B. Ferry and George W. Nash is only in recognition of his research help to both George W. Nash and Arnold B. Ferry. He does this for free.
>
> George W. Nash has his hands full on his own practice and [is] oftentimes sickly. ManAsia, Inc. therefore wanted to hire Arnold B. Ferry as an employee on a full time and permanent basis, hence this application.

AF 259-60.

The CO issued her Final Determination ("FD") on February 3, 1994. AF 271-72. The CO indicated that she had accepted the Employer's documentation regarding its rejection of the two U.S. applicants. However, she stated that the Employer had not adequately documented that it could provide the Alien with "employment" as that term is defined in Section 656.3 of the regulations. AF 271. The CO found that although the Employer had made statements to support its contentions, it failed to provide any objective documentation to support them. The CO stated:

> [The] Alien appeared to be self-employed. The rebuttal states that ManAsia, Inc., George W. Nash, and Arnold B. Ferry are separate entities. Mr. Ferry is

> still associated with Walfredo Castillo in the practice of law and collaborating with George W. Nash in rendering legal services to ManAsia, Inc. The only reference to alien's employment by ManAsia, Inc. is a statement that [the] firm wanted to hire [the] alien on a full time, permanent basis because Mr. Nash is busy with his own practice and is oftentimes sickly. We find that this unsupported statement alone is not a sufficient basis to conclude that employment . . . will exist. It clearly does not exist at this time. Therefore, this application is denied.

AF 271.

On March 9, 1994, the Employer filed its request for review, which included documentation in support of its contentions. AF 282-85.

DISCUSSION

In an attempt to determine whether the Employer could provide the Alien with permanent, full-time "employment," the CO requested in the NOF that the Employer document its response to general questions regarding the relationships between the Alien, Arnold B. Ferry, the Employer, ManAsia, Inc., and the President of ManAsia, Mr. Madlansacay. The CO did not, however, ask for more specific information such as: 1) documentation regarding ManAsia's business, including source of income, location and number of employees; 2) documentation as to whether the Alien has an ownership interest, or managerial involvement in ManAsia; and 3) documentation as to whether ManAsia's viability is dependent on the Alien's presence, knowledge, experience or financial investment. Absent these specific requests for documentation, it appears that the Employer made a good faith effort to respond to the CO's general inquiries regarding the relationships between the Employer, its President, and the Alien.

In an apparent attempt to determine whether ManAsia actually needs to employ a full-time attorney to perform the job duties specified, the CO seemingly sought to discover whether the Alien is currently performing services for ManAsia on a full-time basis. However, the CO failed to ask for this documentation in a straightforward manner (such as requesting information regarding the number of ManAsia's cases the Alien works on each week or the Alien's time sheets showing the number of hours spent on ManAsia's cases). Instead, the CO articulated her request for documentation in an unclear and ambiguous fashion: ". . . you must document . . . that Arnold Ferry is an employee of ManAsia, Inc. on a full-time basis." This statement gives the impression that the CO thought that the Alien, in his role as attorney representing ManAsia, was in an employer/employee relationship with ManAsia.[2] In its rebuttal, the Employer attempted to respond appropriately to the CO's inquiry by explaining that there is not currently an employment relationship, other than that of an independent contractor, between ManAsia and the Alien. Apparently as a result of the ambiguity, it did not provide any documentation as to whether the Alien provides his services to Employer on a full, or part-time basis.

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[2] Other statements made by the CO, including "the application indicates, [that the Alien] does not have his own practice but is an employee of ManAsia" (AF 245), and the CO's request that the Alien update his employment history on the ETA7-50B, also give the impression that the CO believed that the Alien was in an employer/employee relationship with ManAsia.

We find that the NOF was unclear and ambiguous regarding the documentation that the CO was attempting to elicit from the Employer. We also find that the CO did not clearly state the reasoning behind her denial of labor certification in the FD. As it appears that the Employer attempted to comply with the NOF in good faith, we will remand the case to the CO for clarification and to give the Employer an opportunity to rebut. *See, e.g., American Candy Manufacturing Corp.,* 88-INA-274 (Oct. 27, 1989); *Patisserie Suisse, Inc.,* 90-INA-131 (Oct. 16, 1991); *Poultry Classics,* 91-INA-68 (June 21, 1991).

Accordingly, we vacate the denial of certification and remand the case to the CO for issuance of a new NOF which clearly sets forth her proposed bases for the denial of Employer's application.

ORDER

The final determination denying alien labor certification is VACATED, and the case REMANDED to the CO for further proceedings consistent with this decision.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/mg/bg